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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. 227.

HESS, MEYER & COMPANY, Plaintiffs in Error,

vs.

CAMPBELL & GUTAUCO.

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANTS IN ERROR.

Argus B. Thomas,
Isaac Hayward,
Counsel for Defendants in Error.

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OCTOBER TERM, 1906.

No. 227.

BEHN, MEYER & COMPANY, PLAINTIFFS IN ERROR,

vs.

CAMPBELL & GO-TAUCO.

MEMORANDUM IN REPLY IN BEHALF OF DEFENDANTS IN ERROR.

I.

Questions of fact are not reviewable here upon writ of error.

(Main Brief, pp. 10-14.)

II.

The motion for new trial expressly averred that the findings of fact were "clearly and manifestly against the weight of evidence." The motion was denied and due exception taken (Rec., 12). Hence, under section 467 of the Code of Civil Procedure, the Supreme Court was required to review the evidence. But such review cannot, we submit, be again here reviewed on writ of error. The case of *De La Rama vs.*

De La Rama, 201 U. S., 303, rules only that upon *appeal* from the Supreme Court of the Islands, precisely as on appeals from the circuit court, the review in such cases extends to both law and fact. But no such review upon facts extends to cases coming on writ of error from the circuit court, and section 1011, United States Revised Statutes, expressly provides that there shall be no reversal "for any error of fact" in such cases. If the argument *contra* be sound, then the whole record is open upon either writ of error or appeal—a manifest *non sequitur*.

III.

The findings of the Supreme Court in respect of the house abundantly sustain the judgment, independently of the question of law ruled by that court in respect of taking possession by the owner. Certainly taking possession without protest, objection, or complaint, and continued use thereof—upon the very cases cited by plaintiff in error—creates corresponding liability of payment.

(Main Brief, pp. 27-32.)

And upon every element of performance of contract by defendants in error the ultimate facts found (Rec., 100-101) demonstrate the correctness of the court's conclusion therefrom (Rec., 101) that—

> "It follows, that inasmuch as the plaintiffs *complied with their contract and constructed the house according to the plans and specifications and under the direction of the defendants or their authorized agents*, they are entitled to recover therefor the unpaid balance as found by the court below, viz., $9,250.62, Mexican currency."

IV.

In respect of the filling, the facts stated in the opinion of the Supreme Court are sustained by the evidence. If they are reviewable here, *résumé* thereof is given on the Main Brief, pages 33-41. We submit, they fully sustain the court's statement of the proven facts and its conclusions thereon. The sand was measured in fact by plaintiff in error's own representatives (Main Brief, p. 41), and the contractors, accepting those measurements, in turn paid the men delivering the sand on the same measurements. The letter of Mr. Campbell (Ex. 4, Rec., 87) states:

> "Mr. G. W. Cooke,
> *Engineer, 7 Plaza Moraga, Manila.*
>
> "Dear Sir: I beg to acknowledge your favor of the — inst., enclosing communication from Messrs. Behn, Meyer & Co. of the 28th, wherein they inquire as to the filling made by me on their Uli Uli property and request proof that 60,000 cubic meters of sand have been furnished.
>
> "The best proof I can give that the quantity of sand was supplied is their receipt for same and their weekly payments therefor as checked by their representative. I am certainly at a loss to understand the purport of the communication you enclose. My contract with Messrs. Behn, Meyer & Co. reads:
>
> " 'Material will be measured in *whatever way* the said Campbell & Go Toaco—with the approval of Behn, Meyer & Co.—deem most expedient, then spread evenly over the ground to bring the lot to a certain level.' * * *
>
> "The material was measured as taken from the bancas, a representative of Behn, Meyer & Co. being present and checking every meter as delivered. This system was pursued for almost a year, or until the entire completion of the contract. Messrs. Behn Meyer & Co. were thoroughly familiar with it. Their manager was present in numerous instances and their representative at all times. The whole process met with their approval and received their sanction, as

evidenced by their payments week after week for the number of meters checked out by their agent. No question was ever raised during the entire life of the contract as to the method of measurement pursued. The work was done, the quantity receipted for, and the payments made upon the basis above outlined. That this is the usual and customary basis for measurement in such cases cannot be gainsaid. It is the basis on which I have paid the banca men for the sand delivered me. They have been paid—meter for meter—upon the measurement adopted by the representative of Behn, Meyer & Co. and myself. As a matter of fact, the agent of Behn, Meyer & Co. refused in many instances to accept the measurement as made by the banca men, and they were compelled to return and accept more sand. It was accepted then. The books and receipts in my office show that I have paid for 60,000 cubic meters of filling. Every meter was delivered in the presence of and checked by a representative of your company. In view of this, it is not apparent what more could have been done.

"A method of measurement having been adopted and acted upon by both parties, and the contract having been completed upon that basis, it is not clear what bearing the area of ground filled, and the possible depth of the filling in particular spots thereon at this time has upon the matter. As is well known, the ground was extremely rough and broken, being virtually rice paddies, ditched and uneven, some of it swampy. The utter impossibility of estimating the amount of filling upon such ground by superficial measurement, especially after it has shrunk and shifted through a year's settling and been beaten upon by sun and storms through an entire change of season, must be apparent and such method of measurement is patent, as it specifically states that the 'Material will be measured * * * and *then* [afterwards] spread evenly over the ground,' etc. No method of superficial measurement was ever suggested, *were* payments ever made to me reserving *on* intimating such a basis. While I should regret having this matter brought into the courts, I am per-

> fectly ready to do so if the issue is forced. The contract has been fulfilled by me in every particular, and I am willing to stand upon it."

Admitting the force of section 1598, Philippine Civil Code, and the correctness of the decisions of this court in *Kihlberg vs. United States*, 97 U. S., 398; *Sweeney vs. United States*, 109 U. S., 618; *Martinsburg, &c., R. R. Co. vs. March*, 114 U. S., 549; and *Chicago & Santa Fe Railroad vs. Price*, 138 U. S., 185, to the effect that where parties to a contract have agreed upon some third person to determine the amount of labor done or materials furnished under a contract, the determination of such person as to quantities and amounts is conclusive upon the parties, in the absence of fraud or such gross error as to imply bad faith. Counsel for plaintiffs in error, in his Memorandum in Reply, contends that this provision of the Code and the principles enunciated in these decisions can have no application to this case, because no third person was agreed upon by the parties to make the measurements and determine the amount of material delivered. This, we submit, is plainly against the facts here proven.

The written agreement (Rec., 7) states:

> "Material will be measured in whatever way the said Campbell & Go-Tauco—with the approval of Behn, Meyer & Co.—deem most expedient."

This left the method of measurement to be thereafter determined upon by subsequent agreement of the parties. That it was so agreed upon, and that the measurement of the material was left by mutual agreement ~~by~~ the employee and representative of the plaintiffs in error, Behn, Meyer & Co., is perfectly manifest from the evidence. Both Mr. Campbell, Mr. Dittmar, managing partner of Behn, Meyer & Co., and Cereal, one of the men employed by Behn, Meyer & Co. to measure the material, so testify.

Campbell testifies (Rec., 17):

"Q. And was the payment for this sand agreed upon between you and Behn, Meyer & Company? How were you to be paid by Behn, Meyer & Company for this sand?

"A. The receipts were given daily, and at the end of each week, we rendered duplicate bills which were O K'd by the manager of the firm, and then presented for payment weekly.

"Q. Who gave these receipts daily, as stated by you?

"A. An authorized representative of Behn, Meyer & Company.

"Q. And was this authorized representative of Behn, Meyer & Company there all the time to receive the sand?

"A. Constantly; in fact, he lived there on the ground.

"Q. You were always paid according to the amount of the receipts were you not?

"A. I was always paid—made my bills—from the receipts given to me during the week.

"Q. Before payment, would they examine the bills or receipts or any other papers?

"A. I always furnished the receipts with the bills, and they looked over the receipts, and they had also their own book which they always went over, and the two books always corresponded—at least the receipts and their books were the same. In case there was any discrepancy in the matter of a tenth of a meter, it was always arranged right at that moment before the bill was O K'd by the manager.

"By the COURT:

"Q. Whose book is that you are talking about?

"A. The book of their authorized representative to receive the same.

"Q. The man on the ground?

"A. The man on the ground. And each week he turned in his book before I rendered my bills."

And Mr. Dittmar testifies (Rec., 29):

"Q. As the manager of Behn, Meyer & Co., did you at any time personally pay, or direct your

subordinates in the office to pay, any bills for sand?

"A. Yes, sir, I did.

"Q. Before paying any bill what books would you refer to?

"A. No books, only the receipts.

"Q. What receipts?

"A. Receipts signed by the man employed by me."

And again (Rec., 31):

"Q. Are you acquainted with the man appointed by you to count the sand?

"A. *With two of them; there were three of them.*

"Q. Is that one of them?

"A. Yes.

"Q. Do you know his name?

"A. Cercal."

And the witness Cercal (Rec., 31), who was employed by Behn, Meyer & Co. for some four months, or from October 11, 1901, to February 7, 1902, produced the book in which he testifies, he entered every cubic foot of sand delivered, by order of Messrs. Cottencamp and Dittmar, Behn, Meyer & Co.'s managers. The same method was pursued by his predecessor and his successor in employment.

As showing the actual measurement of the material and that such measurement was made exactly in accordance with the instructions given him by Behn, Meyer & Company's manager, Cercal testifies (Rec., 33):

"A. There are certain marks on both sides of the bancas, and I measured the contents by those marks which they use on the water line; and it was the instruction of Mr. Cottoncamp that it was not necessary to measure the bancas."

Here, then, was plainly an agreement between the parties to leave the measurement of the material to the agents appointed by Behn, Meyer & Company. These measurements were accepted as conclusive by both parties, and were the basis upon which payments for the material were made by

Campbell & Go-Tauco to the banca men who delivered the sand, as well as upon which payments were made to them by Behn, Meyer & Co. (Rec., 87). These measurements were the only ones made, and everything in the case clearly shows that these measurements were accepted and treated as conclusive by both parties. Surely nothing could be fairer to plaintiffs in error than thus leaving the measurement of the material to men selected by them; and, this method of determination having been adopted and agreed to by both parties, this is certainly a case where the doctrine of estoppel applies.

The area of this lot, 16,549.62 square meters, equals 178,139 square feet, or something over four acres. Certainly five test-holes, dug on such an extended area, and an estimate of the entire fill made therefrom, cannot be accepted as sufficient to affirmatively prove the quantity of the fill against the facts shown, *contra*.

V.

The contracts for the house and for the filling were in Mexican currency (Rec., 3, Ex. A; Rec., 7, Ex. D). The Philippine coinage act of Congress of March 2, 1903 (32 Stats., 691), in declaring (sec. 2) that the silver Philippine peso shall be legal tender, adds the controlling proviso:

> "That debts contracted prior to the thirty-first day of December, 1903, may be paid in the legal-tender currency of said islands existing at the time of the making of said contracts, unless otherwise expressly provided by contract."

Hence the judgment below in the money of the contract was not in any sense invalid or illegal. Alleged failure to conform to the later act of the Commission, cited by counsel, certainly could not destroy the debt nor the judgemnt. At the most, the court below could only be required to find and state in the alternative, and in the new currency, the value or

amount of such judgment. We submit that would be in any case matter for the initiative of the party in whose favor the judgment stood—not for the judgment debtor to plead as in discharge of a judgment.

Respectfully submitted,

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